Office-Supreme Court, U.S.
FILED
JUL 31 1981
ALEXANDER L. STEVAS
CLERK

No. 80-2088

In the
# Supreme Court of the United States
October Term, 1980

LEODA WREN, et al.,
*Petitioners,*

*vs.*

NOLAN JONES, et al.,
*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## PETITIONERS' REPLY BRIEF

Donald Page Moore
One IBM Plaza
Suite 1414
Chicago, Illinois 60611
(312) 467-1750
Counsel of Record for Petitioners

William S. Hanley
Sorling, Northrup, Hanna,
Cullen and Cochran, Ltd.
800 Illinois Building
Springfield, Illinois 62705
Counsel for Petitioners

The Scheffer Press, Inc.—(312) 263-6850

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Argument | 1 |
| Appendix | 1a |


## TABLE OF AUTHORITIES


| | |
|---|---|
| *Branti* v. *Finkel*, 455 U.S. 507 (1980) | 1 |
| *Elrod* v. *Burns*, 427 U.S. 347 (1976) | 1 |
| *McGill* v. *Board of Ed. of Pekin Elementary School Dist.*, 602 F.2d 774 (7th Cir. 1979) | 2 |
| *Mt. Healthy City School District Bd. of Ed.* v. *Doyle*, 429 U.S. 274 (1977) | 1 |
| *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) | 2 |

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

---

## *No. 80-2088*

---

LEODA WREN, et al.,

*Petitioners,*

*vs.*

NOLAN JONES, et al.,

*Respondents.*

---

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

## PETITIONERS' REPLY BRIEF

---

The real issues presented by this case are two:

1. Should the dual motivation standard of *Mt. Healthy City School District Bd. of Ed.* v. *Doyle,* 429 U.S. 274, 287 (1977) continue to be applied in First Amendment cases of this kind, or should the Seventh Circuit's sole motivation doctrine prevail?

Respondents contend (Resp. Br. 7-8) that the "sole basis" references in *Elrod* v. *Burns,* 427 U.S. 347, 351 (1976) and *Branti* v. *Finkel,* 445 U.S. 507, 516, 517 (1980)

justify the new Seventh Circuit burden of proof "for political affiliation cases." (Resp. Br. 9) That suggests that in the Seventh Circuit the burden of proof in patronage cases is now materially higher than in all other First Amendment cases involving sanctions against public employees. (Resp. Br. 8-9) That poses an issue of extraordinary importance.

However, the more natural reading of the new Seventh Circuit doctrine is that its "sole motivation" rule applies to *all* public employee cases, not just the patronage ones. Thus in *McGill* v. *Board of Ed. of Pekin Elementary School Dist.*, 602 F.2d 774, 779 (7th Cir. 1979) (*nota bene* 779 n. 8) the Seventh Circuit applied its sole motivation rule in a teacher speech case.

Here, the District Judge's findings were reviewed according to the Seventh Circuit anti-*Mt. Healthy* standard. The burden of proof issue thus presented is common to a multitude of pending and future First Amendment cases. See the 156 *Mt. Healthy* opinions collected at Pet. App. 62-72. That makes it immensely important.

2. Respondents ignore the dangerous misuse of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) in this case. See Pet. 12-13.

Respondents devote their brief to the claim that this case has no merit. But here the District Judge held the First Amendment violated, and even the Court of Appeals admitted some "infringement of . . . plaintiffs' First Amendment right[s] . . . ." (App. 17) Thus confronted, respondents obfuscate:

*First.* Respondents ignore the decision of the trier of fact which resolved the issues in petitioners' favor as to facts, motive and intent.*

*Second.* Respondents seek to trivialize petitioners' claim by pretending that one of the two constitutional issues in this case does not exist. Throughout their brief respondents imply that the only constitutional issue is whether they wrongfully *laid off* petitioners. That contradicts the record. The District Judge put it clearly:

> Plaintiffs present two issues asserting violations of plaintiffs' rights under the first amendment. . . . Secondly, *plaintiffs assert that defendants denied them re-employment opportunities in furtherance of*

---

* Respondents' brief seems to reflect a notion that the District Judge had a duty to believe everything that a respondent testified to. For a good example of why they are wrong, see the Appendix to this reply.

Every one of respondents' quarrels with the District Judge's findings can be refuted. To take but one example, respondents make the "incident" of the new DOT jobs from which petitioners were excluded look almost stupefyingly innocent. (Resp. Br. 6) But the facts show:

Thirty-two summer patronage jobs in petitioners' district were created on the day petitioners were laid off. (Pet. 18-19) Respondents suggest that petitioners could not to be transferred to those jobs because they did not apply for them before they were laid off. (Resp. Br. 6) But in fact, respondents had falsified performance reports and withheld layoff notices with the result that petitioners did not know the layoffs were coming. (Pet. 18-19, 21-23) Patronage Chief Hannigan then denied a petitioner's transfer application because it came after his layoff. But a *non*-petitioner's post-layoff application was granted that same month. (Pet. 23) It turned out that *prior* to the layoffs, patronage chief Hannigan had vetoed a recommendation by respondent Rhodes that petitioners be permitted to transfer. (Pet. 18-19)

A reasonable District Judge reasonably smelled a rat.

> ***a patronage program and thus violated plaintiffs' first amendment rights.***
>
> Pet. App. 32 (emphasis added).

The Petition for Certiorari presented this second issue five times. (Pet. 1 ¶2, 9, 10, 11, 16-17.)

By implying that this "re-employment" issue does not exist, respondents manage to shrug off as "miscellaneous incidents" (Resp. Br. 7) much of the evidence on which the District Judge relied. This evidence not only showed motive and intent with reference to the original layoff decision, but also clearly proved an *independent* First Amendment wrong—*keeping* petitioners laid off because they were Republicans. As the District Judge found, those wrongs were not induced by fiscal shortages. (App. 35-38, and see Pet. 18-23, for more details.) Respondents are simply fighting with the findings and fighting with the proof when they claim innocence on this issue.

Finally, respondents argue (Resp. Br. 4): "Many of the incidents . . . concern alleged violations of state employment rules or policies, not of the United States Constitution, and we shall not take time to deal with them here." Sophistry. The "incidents" involve violations of state rules committed for the purpose of discriminating against petitioners because they were Republicans. The District Judge found that a violation of the First Amendment and he was right.

The petition for certiorari should be granted.

Respectfully submitted,

DONALD PAGE MOORE
One IBM Plaza
Suite 1414
Chicago, Illinois 60611
(312) 467-1750
Counsel of Record for Petitioners

WILLIAM S. HANLEY
SORLING, NORTHRUP, HANNA,
CULLEN AND COCHRAN, LTD.
800 Illinois Building
Springfield, Illinois 62705
Counsel for Petitioners

## APPENDIX

The District Judge did not believe that fiscal shortages were responsible for respondents' refusals to re-employ petitioners on a series of occasions, and he said so, citing part of the abundant evidence on that score. (App. 37-38) But respondents, citing a single answer by patronage chief Hannigan, now argue the contrary. Here are the quotes:

*Respondents' Brief*:

"The other vacant positions were not filled at all in response to the effort to live within the reduced appropriations. A. 115a." (Resp. Br. 5; see Resp. Br. 4* for more of the same.)

*Testimony of Hannigan at A. 115a*:

"Q Was there any time when the Wren Plaintiffs were on a re-employment list where there was a vacancy to be filled that you rejected the Wren Plaintiffs that was on the re-employment list?

A Well, I recall that there were vacancies which occurred and which, after much correspondence was received from Mr. Hanley requesting that certain Wren Plaintiffs, who were on re-employment lists, be re-employed. However, we wouldn't be at the point of considering a re-employment list unless a requisition to fill that position had been received from the District, and approved, and we went ahead and determined that there was a legitimate vacancy and that the agency can't carry out its function, unless that position was filled. We were really pretty intent on not filling any position for quite some time because of the budgetary straits that all of State Government was in at that time.

I think the record will show that there weren't very many full-time positions hired for quite some period."

Our comments: The answer doesn't support respondents' assertion. The answer evades the question. The answer is vague, full of self-serving generalities.

The District Judge was not required to accept patronage chief Hannigan's conclusions as to an ultimate issue in this case. In fact, he rejected them. That ought to settle the facts on appeal. Respondents are simply quarreling with a verdict.